RECORD AND BRIEFS

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ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,

v.

MARIA STAPLETON, ET AL.,
Respondents.

ST. PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,

v.

LAURENCE KAPLAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Courts of Appeals for the Seventh and Third Circuits

BRIEF OF THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Catholic Health Association of the United States ("CHA") is the national leadership organization for the Catholic Church's health ministry.[1] This ministry comprises more than 600 hospitals and 1,400 long-term care and other health facilities in all 50 states and the District of Columbia. CHA advances the Catholic health ministry's commitment to a just, compassionate health care system that protects life. CHA members have relied for decades on an application of the "church plan" exemption contained in the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA") that encompasses their plans as ministries of the Roman Catholic Church in the United States. We believe the Courts of Appeals' construction of the statute to be both unintended by Congress and, if as described by the Courts of Appeals, unconstitutional. Respondents' argument that our members' ministries are just big business masquerading as the Church ignores the concerted efforts of Catholic Bishops, women religious, the Holy See in Rome and others to assure that contemporary Catholic healthcare, even when established through corporate or other civil

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[1] Counsel of record for all parties received timely notice at least ten days prior to the filing due date of CHA's intention to file this brief. All parties have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of this Court, CHA states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief *amicus curiae*. No other person other than CHA or its counsel made a monetary contribution to its preparation or submission.

combinations, is indisputably part of the Church. The Courts of Appeals' constructions of ERISA threaten the stability and religious autonomy of Catholic healthcare nationwide.[2] CHA members have been the targets of more than two dozen lawsuits since the decisions were issued, adding further to the direct threat to their work. Immediate corrective action by this Court is needed so as not to perpetuate the uncertainty created by these decisions.

As the representative of its member institutions, CHA explains that Catholic healthcare, evolved from its historic roots to contemporary healthcare systems, is certainly religious, unequivocally Catholic, and always "Church." That the establishment and maintenance of Catholic health systems' benefits programs do not precisely mirror the civil and ecclesiastical structures used by the denominations that lobbied for passage of the 1980 amendments to broaden the coverage of ERISA, does not and cannot place Catholic healthcare outside of the protections of the law. Accepting the Courts of Appeals' construction would mean that Congress passed a denomination or polity-specific law that accommodates one form of religion, but not all. Such a discriminatory approach could not have been intended and should not be approved.

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[2] We note that on July 26, 2016, the Ninth Circuit added to the confusion when it adopted the rationale of the Third and Seventh Circuits on the construction of the ERISA church plan exemption. *See Rollins v. Dignity Health*, --- F.3d ----, No. 15-15351, 2016 WL 3997259 (9th Cir. July 26, 2016).

SUMMARY OF ARGUMENT

The Third and Seventh Circuit Courts of Appeals' interpretations of "church plan" leave no room for the modern day operational and mission structures emblematic of Catholic health ministries across the country, structures that Congress intended to envelop by amending ERISA in 1980, as confirmed in the long-standing interpretation of those amendments by the I.R.S. Those amendments eliminated the narrow viewpoint that only a brick-and-mortar house of worship may be considered a church for ERISA purposes. The Courts of Appeals' analyses, however, reject ERISA's definition that embraces a "church plan" maintained by an organization "controlled by or associated with a church or a convention or association of churches" in favor of requiring proof that a plan was established by "a church."

From the perspective of Catholic healthcare, to construe the "church plan" exception in this manner runs afoul of the undeniable freedom afforded to religious institutions to organize themselves—in form and substance—according to their own religious principles. It invites civil courts to parse through a constitutionally impermissible inquiry into what is a "church" for purposes of ERISA regulation. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (trolling through institutional religious beliefs not allowed). It also derogates the concerted work of Catholic leaders to assure that their healthcare ministries were always directly and integrally inside the Church, even as they grew from small community institutions often run by Sisters into more modern corporate forms. The Courts of

Appeals' decisions conclude that somewhere in this evolution, newly-formed Church structures that continued this religious ministry lost their exemption notwithstanding I.R.S. confirmation at every turn, while other religions that continued their structures unchanged since the 1980s remained exempt.

The clearest command of the First Amendment Religion Clauses is that the government may not favor or discriminate against one religion versus another. *Larson v. Valente*, 456 U.S. 228, 252 (1982). On matters of religion, including administration within ecclesiastical polity,[3] the exercise of religious authority, and even something as elemental as what constitutes "a church," the government "knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *United States v. Ballard*, 322 U.S. 78, 86 (1944) (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1871)). In construing ERISA and its exemption for "church plans," this Court should follow the constitutional text commanding the same course of ERISA administration plotted over the past three decades—to accommodate broadly the

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[3] "Polity," as used here, denotes a mode of governance and organization by which religious entities are structured and authority is exercised in accord with doctrine and teaching of that religious body. Some organizations are tightly controlled and decision-making is vertically hierarchical; others are congregational where decision-making is shared horizontally. Some are connectional—emphasizing relationships among communities sharing faith. Still others have a mix of elements that are hierarchical, connectional and congregational. Congress did not intend (and could not have constitutionally intended) to exempt one and regulate the others.

variety of religious experience, polity, and structure in the United States. To construe the text of the "church plan" exemption as the Courts of Appeals did would be to embrace only certain denominational structures that fit within a narrow civil view of "church" and would result in discrimination in fact that cannot be squared with the First Amendment.

From its earliest activities, Catholic healthcare has always followed the example of Jesus to heal the sick, delivered by religious women and men dedicated to such service. Today, that ministry has matured with the society around it, using structures, organizations, and technology that were unknown to the religious orders when they began. The Catholic Church entrusts Catholic healthcare ministry to the dioceses, religious orders and other Church canonical entities that sponsor and control it. These health ministries are established by the Church, recognized as "Catholic" by the applicable diocesan bishops and are publicly acknowledged by the Church as "Catholic" works. Sharing far more than the "common religious bonds and convictions"[4] required by ERISA, they share in the mission of Jesus made manifest in the modern world. That these ministries may be civilly incorporated or organized through other combinations and forms does not place Catholic healthcare entities outside of the Church or outside the scope of the statutory exemption.

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[4] ERISA provides that an organization "is associated with a church" if it "shares common religious bonds and convictions with that church." 29 U.S.C. § 1002(33)(C)(iv).

Consistent with Congress' recognition that myriad agencies who serve the missions of churches, synagogues and religious conventions at the local, regional, and national levels are "Church," ERISA provides that the "church plan" exemption covers a plan maintained by an organization "whether a civil corporation or otherwise . . . controlled by or associated with a church or a convention or association of churches."[5] To ensure all religiously-affiliated denominational entities have equal access to ERISA's "church plan" exemption as Congress intended, CHA urges this Court to grant Petitioners' writs of certiorari and correct the erroneous application of ERISA by the Courts of Appeals.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

A. The Third and Seventh Circuit Opinions Leave No Room in ERISA's "Church Plan" Exception for the Ministry of Catholic Healthcare

From its earliest activities, Catholic healthcare has always followed the example of Jesus to heal the

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[5] 29 U.S.C. § 1002(33)(C)(i); *See also* 125 CONG. REC. 10,052 (1979) (statement of Sen. Herman Talmadge) ("[T]o accommodate the differences in beliefs, structures, and practices among our religious denominations, all employees are deemed to be employed by the denomination . . . [and the term "employee" is to be redefined to include] an employee of an organization which is exempt from tax and which is controlled by or associated with a church . . . .").

sick, delivered by religious women and men dedicated to such service. Today, that ministry has matured with the society around it, using structures, organizations, and technology that were unknown to the religious orders when they began. The Catholic Church entrusts its healthcare ministry to the dioceses, religious orders and other Church canonical entities that sponsor and control it, to assure that it is delivered according to Church teaching. These health ministries are established by the Church, recognized as "Catholic" by the applicable diocesan bishops and are publicly acknowledged by the Church as "Catholic" works.[6] Sharing far more than the "common religious bonds and convictions" required by ERISA, they share in the mission of Jesus made manifest in the modern world.

To be a "church" in the United States does not mean the building that houses liturgical worship at designated dates and times. It has always been the religious experience in the United States that "a

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[6] Karen Sue Smith, *A Summary: Caritas in Communion*, 94 HEALTH PROGRESS at 81 (July–Aug. 2013). Although Canon 216 provides that all "faithful have the right to promote or sustain apostolic action even by their own undertakings, according to their own state and condition," it specifically fixes the right to name something *Catholic* in "competent ecclesiastical authority" with respect to the entity or activity; it could not be undertaken *sua sponte*. Robert J. Kaslyn, S.J., *The Obligations and Rights of All the Christian Faithful*, NEW COMMENTARY ON THE CODE OF CANON LAW at 272 (Beal, et al., eds. Paulist Press 2000) (noting also canon 209 concerning the duty of the faithful to maintain communion with the Church in their actions and activities – here to include healthcare).

church" extends past brick and mortar and beyond official ceremony to animate the surrounding community. Indeed, at the time of the Revolution, all of the engines of social welfare—schools, hospitals, and social services—were in the hands of churches.[7]

Catholic healthcare ministry in the United States is most often traced to the arrival of the Ursuline Sisters in New Orleans in 1727, where they cared for the sick and managed the Charity Hospital.[8] These Sisters, like the Sisters who followed them to the new United States from France, Germany, Ireland and elsewhere, worked long days to tend to the sick and needy:

> Religious sisters cared for victims of smallpox, cholera, typhus, and yellow fever. They nursed soldiers on the battlefields during the Civil War. They built hospitals, nursing homes, and clinics. They integrated hospitals. They spoke out on behalf of justice. *** Continuing this tradition of service,

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[7] *See* Michael McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 420–24 (1986); William Clayton Bower, CHURCH AND STATE IN EDUCATION 23–24 (Univ. of Chicago Press 1944); *see also generally* Bernard J. Coughlin, CHURCH AND STATE IN SOCIAL WELFARE (1st ed., Columbia Univ. Press 1965).

[8] Julie Trocchio, *A Wondrous History of Community Benefit*, HEALTH PROGRESS 11 (Nov.–Dec. 1996), *available at* https://www.chausa.org/docs/default-source/health-progress/community-benefit-continuing-the-tradition---a-wondrous-history-of-community-benefit-pdf.pdf?sfvrsn=0 (last visited Aug. 2, 2016).

> congregations of religious women and men and dioceses have served America's communities. They identified needs; they took action.

Id. By 1884, there were approximately 200 Catholic hospitals in the United States, and by the time of the First World War, that number had tripled.[9] During this growth period, the Sisters, Bishops and others who founded Catholic hospitals remained firmly in charge of healthcare ministry. Grappling with advances in medical technology, standardization of procedures, the need for better administration, transportation and communication, these hospital founders expanded and modernized their medical facilities, ensured medical staff met the newest requirements, and used civil structures to best assure efficient operations that aligned income, operations and risk. There was no dispute about the hospitals' Catholicity or role as Church.

Later in the twentieth century, the demographics for religious Sisters showed a decline—rapid in some instances—in the numbers of Sisters who could work in their historic ministries, including healthcare. Against the backdrop of the Second Vatican Council, the Sisters started to implement new civil and canonical mechanisms to assure the continuity not only of their work, but also its essential Catholicity. These efforts were not motivated by increasing revenue, but rather by the

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[9] Our History, *The Catholic Health Association of the United States*, http://www.chausa.org/about/about/our-history (last visited Aug. 11, 2016).

conviction that communities were demonstrably better as a result of Catholic healthcare ministry which could not and should not be lost to modernity. Orders of Sisters found new ways to work together, beginning to serve as joint sponsors of now consolidated and reorganized healthcare systems, to ensure the ministry would survive in the current realities of the American economy and culture.

So too today. Sponsors of Catholic healthcare employ contemporary civil structures and arrangements to perform ministry in a modern world, under canonical structures that assure the preservation and advancement of the Catholic Church's apostolic work. "Sponsorship continues to move Catholic health care toward a more complete understanding of communion ecclesiology, a fuller vision of the shared work of laity, vowed religious and bishops."[10]

With approval from proper Church authorities, calling healthcare "Catholic" in its governing documents names it as "apostolic activity."[11] In other words, in Catholic theology, where consolidated

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10 Karen Sue Smith, *A Summary: Caritas in Communion*, 94 HEALTH PROGRESS at 81 (July–Aug. 2013).

11 See sources noted at note 6, *supra*. All public juridic persons, whether *de jure* or *de facto*, are entitled to legitimate autonomy over their own affairs and administration, but all are subject to higher Church authority over their Catholicity. In a diocese, that is the Bishop. Canons 392 (Bishop fosters the common discipline of the Church), 394 (Bishop fosters various forms of apostolic works, "with due regard for the proper character of each.").

and expanded healthcare systems are "Catholic," they are undisputedly a constituent part of the Church. Such evolution is prompted by modernity; as the Bishops of the Church in the Second Vatican Council said "the Church has always had the duty of scrutinizing the signs of the times and of interpreting them in the light of the Gospel."[12]

In Respondents' worldview, and under the statutory interpretation adopted by the Third and Seventh Circuits, a church is a limited thing—the place of worship or the named entity dedicated to that purpose. It would be wrong for this Court to be so limited in outlook. Contemporary, like historical, religious experience of being "church" is found in acts of service and evangelization through providing health, education, or other services. That these ministries may be civilly incorporated or organized through other combinations and forms does not place Catholic healthcare entities outside of the Church. This is the nub: to restrict an establishing organization of a pension plan to a civilly-defined "church" entity ignores this history and, as discussed further below, the constitutional boundaries of "Church." Who is to judge that actions by a civilly-incorporated Catholic hospital which continues a historic ministry of its founding religious orders (where Sisters are still responsible for mission and

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[12] *Gaudium et Spes*, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, ¶4 (1965), *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (last visited Aug. 2, 2016).

governance) are any less "Church" than those taken by a parish? Only the Church.[13] Having received permission of Church authorities, healthcare sponsors are assured that their work is authentically Catholic and will remain so until the Church decides otherwise, a point beyond the ability of any secular court to adjudicate, as discussed below. To hold otherwise would both impermissibly invade religious autonomy and jeopardize the Catholic ministries that operate beyond the walls of steepled buildings.

B. The Approach Adopted by the Third and Seventh Circuits Tramples Rights of Religious Neutrality and Church Autonomy Respected in ERISA and by Government Agencies Applying It

1. On matters of religion, including administration within ecclesiastical polity, the exercise of religious authority, and even something as elemental as what constitutes "a church," the government "knows no heresy, and is committed to the support of no dogma, the establishment of no

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[13] For example, the Vatican directed that St. Louis University Hospital, a nonprofit Catholic institution, was "church property," regardless of its legal status as a civil corporation or its ownership by an independent board of university trustees, therefore requiring Vatican approval for its sale outside the Church to publicly traded Tenet Healthcare. Without such approval, the transaction was invalid under canon law. Pamela Schaeffer, *Cardinals claim rights in hospital dispute*, NAT'L CATHOLIC REP., (Oct. 24, 1997), *available at* http://natcath.org/NCR_Online/archives2/1997d/102497/102497d.htm (last visited Aug. 2, 2016).

sect." *United States v. Ballard*, 322 U.S. 78, 86 (1944) (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1871)). Rather, the government must be neutral and evenhanded in its administration of its programs, including its regulation of religious matters. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 17 (1947). In construing ERISA and its exemption for "church plans," this Court should grant the petitions for writs of certiorari in order to clarify that courts must follow the constitutional jurisprudence commanding the same course of ERISA administration plotted over the past three decades, which accommodates broadly and intentionally the variety of religious experience, polity, and structure in the United States.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 252 (1982). In *Larson*, this Court held that a state statute violated the Establishment Clause by imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty percent of their funds from nonmembers. This Court has repeatedly emphasized the "central Establishment Clause value of official religious neutrality." *McCreary Cnty. v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 860 (2005). *See also, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion . . ."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."); *Everson*, 330 U.S. at 15 (declaring

that no State can "pass laws which . . . prefer one religion over another"). A violation of neutrality by discriminating against one kind of religious organization versus another also violates the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 876 (1990). Exempting some religious actors, while regulating others similarly situated, is the kind of religious gerrymander that this Court has condemned. *Lukumi*, 508 U.S. at 534. If Congress intended to discriminate in this fashion, the statute indeed would be void.[14]

When confronting the rare situation where legislation appears to inject government into religion in an unconstitutional fashion, this Court construes statutes to avoid patent unconstitutionality. In *N.L.R.B. v. Catholic Bishop of Chicago*, this Court construed the National Labor Relations Act not to apply to Catholic primary schools because the

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[14] In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court protected the exercise of religion in secular for-profit corporations: "Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners' religious principles." *Id.* at 2756. "Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them." *Id.* at 2755.

proffered reading of the Act by the Board would have led to an unconstitutional entanglement with religion. 440 U.S. 490, 504–07 (1979). The process of separating "religious" from nonreligious functions in those schools was the fatal problem. A plurality in *Mitchell v. Helms* reminded that it is not a proper function of government to "troll through" the beliefs and practices of religious body to decide whether it is "religious enough." 530 U.S. 793, 828 (2000).[15]

2. Even where a statute plausibly applies only to one kind of religious practice, this Court has not hesitated to construe the statute more broadly to save it from an unconstitutional interpretation. In construing the Universal Military Training and Service Act, for example, the phrase "religious training and belief" encompassed all beliefs in a form of "Supreme Being" whether religious or not. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965). That construction of the Act "would be in keeping with [Congress'] long-established policy of not picking and choosing among religious beliefs." *Id.* at 175. This

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[15] Certainly there are times when Congress or administrators can and do draw distinctions among religious organizations. The Internal Revenue Code exempts "churches" and their "integrated auxiliaries" from filing information returns, but not other ministries. Those other ministries, however, are often supported by public funds through government grants and projects and community fund-raising, creating a public interest in understanding their funding and financing. Here, Congress intended to draw a wider circle around religiously-affiliated organizations rather than pick-and-choose among religious structures and polities. *E.g.*, 125 CONG. REC. 10,052 (1979) (statement of Sen. Herman Talmadge).

Court in *Welsh v. United States* extended the Act to encompass an objection that was explicitly "moral," and avoided the Establishment Clause objection. 398 U.S. 333, 341 (1970); *see also id.* at 345 (Harlan, J., concurring in the result).

Even normally narrow constructions must make room for the First Amendment. The general rule is that evidentiary privilege exceptions are narrowly construed to facilitate the fact-finding process of trial. Yet, where litigants challenged penitential privilege statutes written in denominational specific language, courts have construed the "priest-penitent" text in statutes to encompass and protect religious communications even where a religion did not have nominal priests (or even clergy) or sacramental penance. *See, e.g., Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994) ("Reading the [clergy] privilege statute narrowly would create the risk that the law would be discriminatorily applied against religious practices of churches on the basis of theological differences . . ."); *State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998) (Broad reading of privilege statute required "to minimize the risk that the [clergy privilege statute] might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine, and in order to least interfere with [the First Amendment] . . .").

If a statute is construed and applied in a nondiscriminatory manner, it is also plainly constitutional under the Establishment Clause. It relieves the regulatory burden on religion, allows religious agencies to function according to their own internal rules, and creates the least entangling

relationship with government. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335–36 (1987); *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675–76 (1970).

3. This Court has made plain its intention to avoid entangling courts in sorting out religious questions. The First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (citing *Serbian Orthodox Diocese*, 426 U.S., at 724–25; *cf. Watson v. Jones*, 80 U.S. 679, 733–34 (1872)). Even where the matter before this Court was the distribution of real property, it deliberately adopted a rule that permits religious bodies to compose their secular property documents in accord with religious principle and provide for the distribution of property according to religious law and tradition. *Wolf*, 443 U.S. at 606. This avoids having courts decide questions about which successor religious entity is "religious enough."[16] None of these constructions lift form over substance. Rather, statutes are construed to allow religious bodies the freedom to express their organization, governance, authority, and affiliation according to their own internal doctrine and rules,

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[16] The *Wolf* majority specifically identified this construction of the constitutional requirements as a way of responding to the dissent's criticism that the civil courts would be applying civil law in a way that was offensive to religious organizations. *Compare* 443 U.S. at 605, *with id.* at 611–13.

and not to cabin religious entities to a single mode of organization and operation. To have interpreted them otherwise would be unconstitutional.

Relatedly, this Court and other courts have long recognized that the civil incorporation of a religious entity does not change its religious character, nor does it open religious doctrine to civil debate. *E.g.*, *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 713, 718–19 (1976) (recognizing that civil courts are "bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law" and finding error in the Illinois Court allowing conflicting expert testimony concerning internal church procedures); *Wheelock v. First Presbyterian Church*, 51 P. 841, 843 (Cal. 1897) ("Notwithstanding incorporation, the ecclesiastical body is still all important. The corporation is a subordinate factor in the life and purposes of the church itself.").

4. Congress intended a broad and open-ended church plan exemption to ERISA that provided a legitimate accommodation for the concerns of the variety of religious denominational polities in the United States. 125 CONG. REC. 10,052 (1979) (statement of Sen. Herman Talmadge). The particular communion that is the Catholic Church and its integral and affiliated ministries, such as healthcare, was certainly intended by advocates and sponsors to be enveloped within the denominations benefited by the 1980 amendments to ERISA. *See id.* ("All the major church denominations in this country—Protestant, Catholic, and Jewish . . . need

and desire relief . . . Church agencies are essential to the churches' mission. They are for the sick and needy and disseminate religious instruction."). In light of this amendment, the I.R.S. reversed direction[17] and specified that all church agency benefit plans would be now considered to be exempt from ERISA as "church plans." The I.R.S. has maintained this unbroken line for more than three decades. *See* I.R.S. General Counsel Memorandum 39007, 1983 WL 197946 (July 1, 1983).

The polity of the Catholic Church is not like the polity of those religious agencies that principally advanced the 1980 amendments to ERISA at issue here. While questions of doctrine, morals, ethics and principle are enunciated through the Pope and the College of Bishops, structurally, the Catholic Church consists of a variety of actors and activities, a bundle of ecclesiastical elements that each, in its own way, expresses some aspect of the Church.

The decision about what is or is not Catholic is reserved to Church leaders[18] at the appropriate

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[17] *See* I.R.S. General Counsel Memorandum 37266, 1977 WL 46200 (Sept. 27, 1977) (opining that "religious orders whose principal activity is the operation of hospitals," were not "churches" within the meaning of ERISA "because the principal activity of the orders is the operation of hospitals," which the I.R.S. believed was "not religious in nature"), revoked by I.R.S. General Counsel Memorandum 39007, 1983 WL 197946 (July 1, 1983).

[18] Each Bishop in his own diocese has the right to declare that an activity is "Catholic" or "not Catholic." For instance, the Bishop of Baker, Oregon withdrew the Catholic designation from a hospital in Bend, Oregon due to his conclusion that it no

level—the designation is not self-appointed by the actor nor may it be adjudicated by the civil courts. *E.g., McCarthy v. Fuller*, 714 F.3d 971, 975–78 (7th Cir. 2013) ("Religious questions are to be answered by religious bodies" and therefore where "the Holy See has spoken" as to whether a person is a member of a Catholic religious order, the civil courts have "no authority to question that ruling"). Use of the name "Catholic" (canon 216)[19] or verification of a program's adherence to Church teaching (canon 803)[20] are purposefully under the purview of ecclesiastical authorities entrusted to protect the authenticity and Catholicity of apostolic work in the life and ministry of the Church.[21] Where Church authorities have

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longer adhered to some Catholic teachings. *See* Ed Langlois, *Bishop says Oregon hospital can no longer be called Catholic*, CATHOLIC NEWS SERVICE (Feb. 16, 2010), *available at* http://www.catholicnews.com/services/englishnews/2010/bishop-says-oregon-hospital-can-no-longer-be-called-catholic.cfm (last visited Aug. 2, 2016).

19 "[N]o undertaking is to claim the name *Catholic* without the consent of competent ecclesiastical authority." Canon 216 (emphasis in original).

20 Section 3 of canon 803 provides that "no school is to bear the name *Catholic school* without the consent of competent ecclesiastical authority." (Emphasis in original.)

21 Only Catholic Church agencies are entitled to federal income tax exemption by virtue of being listed under the United States Conference of Catholic Bishops group ruling exemption. *See* I.R.S. Letter to United States Conference of Catholic Bishops regarding Group Tax Exemption (May 27, 2016), *available at* http://www.usccb.org/about/general-counsel/upload/group-ruling-irs-determination-letter.pdf (last visited Aug. 1, 2016).

confirmed an agency as Catholic, and its works as "apostolic action" under canon law, the government lacks the authority, especially at the behest of some litigant, to look behind that determination to see if the agency is "religious enough" or deny it accommodation because it lacks a specific form of religious organization. *See Wolf*, 443 U.S. at 602.

If this Court were to leave in place the Third and Seventh Circuits' misconstruction of ERISA's church exemption, it would create an unequal national regime where any litigant in those Circuits could second-guess whether its religiously-affiliated employer is religious enough and whether its associated activities qualify as "Church." The consequence is that Congress' 1980 amendments would necessarily have failed to accomplish the explicitly-desired exemption from ERISA regulation. Deviating from the consistent administration by the I.R.S., regulators would now be required to undertake the very kind of entangling scrutiny which Congress sought to prevent. *See* 125 CONG. REC. 10,052 (1979) ("If we have enacted a statute that may require the church plans to come under ERISA . . . it must be changed because we have clearly created an excessive Government entanglement with religion.") Some denominational agencies, organized in a way that fit Respondents' reading of the statute, would be exempt, while others would be regulated. The very denominations that lobbied for the 1980 amendments could be in jeopardy to the extent that their "church agencies" are not considered to be "churches."

Grounded in the 1980 amendments, however, the government has consistently interpreted ERISA in a way that accommodates church agencies and

organizations that share common bonds and affiliation. Neither Congress nor the I.R.S. has insisted that form trumps substance. The writs of certiorari should be granted to ensure the same, to re-confirm the ERISA church plan's applicability to all qualifying organizations throughout the United States maintaining such plans.

CONCLUSION

Given the sheer breadth of religious organizations in this country that have relied upon the federal government's long-standing interpretation of ERISA's "church plan" exemption, and the palpable uncertainty and hardship facing Catholic healthcare, the petitions for writs of certiorari should be granted.

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